United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

366A

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 24640

MAZHAR JALIL,

Appellant,

vs.

ROBERT E. HAMPTON,
Chairman, United States Civil
Service Commission,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ISSUE PRESENTED FOR REVIEW

May the United States Civil Service Commission, Consistent with the Due Process Clause of the Fifth Amendment, Absolutely Exclude Resident Aliens from All Employment in the Civil Service of the United States?

This case has not previously been before this Court.

REFERENCE TO RULING

The only ruling by the Court below which sets forth the basis of the judgment presented for review by this Court is the Court's order granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment. The order is set out in the Appendix at p.22.

STATEMENT OF THE CASE

The appellant, plaintiff below, appeals from an order of the United States District Court for the District of Columbia, entered on July 24, 1970, denying his motion for summary judgment and dismissing his suit for declaratory and injunctive relief against the appellee, the Chairman of the United States Civil Service Commission (A.22). The suit, instituted as a class action, sought to challenge the validity of the rules of the United States Civil Service Commission, 5 C.F.R. §§ 338.101, 302.203(g), which provide essentially that a person may be admitted to the competitive examination for appointment in the Civil Service and may receive

such appointment only if he is a United States citizen. The regulations in question were promulgated pursuant to the authority granted under Executive Order 10577, Part I, § 101, Rule 1, §2.1, which authorizes the Civil Service Commission to establish standards with respect to citizenship and other requirements which applicants must meet to be admitted to or be rated in competitive examinations for the Civil Service. There is no law of Congress specifically restricting the permanent employment of aliens in the Civil Service of the United States. However, the Congress has regularly provided in appropriations acts that appropriated funds may not be used to pay the compensation of persons employed in the continental United States unless such persons are citizens of the United States or come within certain exceptions not pertinent in the case at bar. The present limitation may be found in the Public Works Appropriation Act of 1970, Public Law 91-144 § 502. Although the plaintiff has contended that the restriction goes beyond the authorization contained in Executive Order No. 10577, in that it imposes an absolute bar rather than

reasonable conditions with respect to citizenship, it will be conceded that such bar is consistent with the "spirit of the applicable appropriation acts," as the government has contended. The plaintiff sought a declaratory judgment to the effect that the regulations denying Civil Service appointment to aliens admitted for permanent residence and the provisions of the appropriation acts barring the use of appropriated funds to pay the compensation of non-citizen employees whose post of duty is in the continental United States were unconstitutional as violative of the Fifth Amendment's guarantee of due process of law. He also sought injunctive relief that would enable him to take the competitive examination for appointment in the Civil Service.

The plaintiff, a national of the Republic of India, was admitted to the United States for permanent residence on August 8, 1968. He is an entomologist by profession, holding the degree of Doctor of Philosophy in Biology. At the time of the suit he was employed as a Research Associate in the Department of Entomology of the University of Kentucky and is

currently employed by the Department of Public Health of the State of Ohio. In his complaint and affidavit in support of his motion for summary judgment, he stated that he desired to be employed in forestry, agriculture or malaria control and did not desire to be employed in any position involving the internal or external security of the United States or in any position for which a special security clearance is required. He also stated that he was prepared to execute an oath of allegiance to the United States as a condition of obtaining employment in the Civil Service of the United States (A. 5).

On August 10, 1968, plaintiff applied to the United States Civil Service Commission to be admitted to the competitive examination for Civil Service Rating (A. 4). By letter dated September 17, 1968, he was advised that he was ineligible to take the competitive examination because he was not a citizen of the United States (A.12). Plaintiff made further inquiries of appropriate governmental officials with reference to his eligibility and was advised in all cases that he was ineligible

to take the examination because he was not a citizen of the United States. The present suit followed. The material facts are not in dispute, and the action of the Court below in denying plaintiff's motion for summary judgment and granting the defendant's motion to dismiss must be taken as sustaining the validity of the challenged provisions of law.

ARGUMENT

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT RENDERS UNCONSTITUTIONAL AS ARBITRARY AND UNREASONABLY DISCRIMINATORY REGULATIONS OF THE UNITED STATES CIVIL SERVICE COMMISSION WHICH ABSOLUTELY EXCLUDE RESIDENT ALIENS FROM ALL EMPLOYMENT IN THE CIVIL SERVICE OF THE UNITED STATES.

The essential issue in this case is whether the Civil Service Commission may, consistent with the Fifth Amendment, absolutely bar resident aliens from all employment in the Civil Service of the United States. Ever since Truax v. Raich, 293 U.S. 33 (1915), it has been unconstitutional for the government to require discrimination against aliens in private employment, and discrimination against aliens as such in competition with citizens was held to "fall under the condemnation of the fundamental law." While the decision in that case was based on the equal protection clause of the Fourteenth Amendment, it cannot be doubted that a federal law imposing such discrimination would constitute "impermissible discrimination, so unjustifiable as to be a denial of due process." Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163 (1964). See also Colorado Anti-Discrimination Commission v. Continental

Air Lines, 372 U.S. 714, 721 (1963).

This nation has not readily countenanced discrimination against resident aliens. As this Court has observed:

> Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship guaranteed to all perons within our borders. . . Correlatively, an alien owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens. . . Eisler v. United States, 170 F.2d 273-279 (D.C. Cir., 1948).

> The courts stand ready to safeguard aliens against unreasonable discriminations, and to invoke the equal protection clause of the Fourteenth Amendment as to actions by states, or the due process clause of the Fifth Amendment which provides equivalent safeguards against unreasonable action by the Federal Government. Nielsen v. Secretary of the Treasury, 424 F.2d 833, 846 (D.C. Cir., 1970).

In Truax v. Raich, supra, the Supreme Court invalidated a state law which required discrimination against aliens in private employment. Likewise laws discriminating against resident aliens with respect to the right to own and acquire property and to engage in ordinary employment have been

invalidated. Torao Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Oyama v. State of California, 332 U.S. 633 (1948); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). Again, as this Court has observed:

> Court decisions have gone far to establish equal rights for aliens resident in the United States to work for a living in the common occupations of the country, even exploiting resources owned by a State, and to own land. Even aliens not resident have the right to reasonable compensation for property taken by the State. In effect the burden is on the government to put forward the special reasonableness of and justification for any measure discriminating against aliens. Nielsen v. Secretary of the Treasury, supra, 424 F.2d at 846.

While early notions of the status of aliens permitted restricting certain callings to citizens on the ground that citizenship bore some relationship to qualification for such occupations, State of Ohio ex rel. Clark v. Deckebach, 274 U.S. 392 (1927), such a view is in serious conflict with the strong trend towards removing all discrimination against resident aliens unless the clearest justification can be shown. And in any event, even the earlier notion did not admit of a whole-

sale, entirely unsupported exclusion of aliens like that in question here.

The question in the case at bar then is whether a resident alien may be discriminated against by being denied any opportunity for public service with the federal government. The constitutionality of the regulations in question has never been passed upon by the Supreme Court. Early cases, however, did hold that it was permissible for states to discriminate against aliens with respect to governmental employment, Heim v. McCall, 239 U.S. 175 (1915), Crane v. New York, 239 U.S. 195 (1915), and these cases have been relied upon to sustain the validity of the regulations in question. Such reliance, it is submitted, is misplaced. These cases were not based so much on the premise that it was reasonable or rational for a state to bar aliens from public employment, but as on the view that a state was free to be as arbitrary as it wished in distributing the "privilege" of public employment. 1/ The notion that public employment is a

1/ Thus, e.g., referring to Atkins v. Kansas, 191 U.S. 207 (1903), the Court in Heim v. McCall stated:

"privilege" which the states can condition without limitation has been firmly repudiated. See e.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Shelton v. Tucker, 364 U.S. 479 (1960); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); Keyshian v. Board of Regents, 385 U.S. 589 (1967); Stewart v. Washington, 301 F.Supp. 610 (D.D.C. 1969). Similarly, it has been rejected as applied to federal employment. See, e.g., United Public Workers v. Mitchell, 330 U.S. 75 (1947); see also Norton v. Macy, 417 F.2d 1161 (D.C. Cir., 1969). Indeed, the general concept of governmental license in the dispensation of benefits has been overturned. See e.g. Sherbert v. Verner, 374 U.S. 398 (1963); and see generally, Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv.

"It was there declared, and it was the principle of decision, that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." And it was said: 'No Court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.'"239 U.S. at 191.

L. Rev. 1439 (1968).

The rationale upon which Heim v. McCall and Crane v. New York were bottomed is no longer valid, and their force greatly diminished. Further, to the extent that they are read as supporting the premise that states may exclude all aliens from public employment, notwithstanding contemporary acceptance of the notion that constitutional standards do inhibit governmental license in public employment, they must be considered to have been voided of authority by more recent judicial expositions of the rights of aliens.

It does not appear that the question of exclusion of aliens from public employment has been considered by the federal courts in recent years, but at least two state courts have considered it and have found such discrimination to be unlawful. In Department of Labor v. Cruz, 45 N.J. 372, 212 A.2d 545 (1965), the New Jersey Supreme Court invalidated an 1889 statute prohibiting contractors on public works from employing aliens, the very kind of statute that was upheld in Heim v. McCall

and Crane v. New York, supra. The basis of its decision was that the statute was impliedly repealed by subsequent laws. In particular, it construed the state law against discrimination, referring to "national origin or ancestry" as including aliens within its coverage. If the "national origin" provision of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964), is so construed, we would have the anomalous situation of the federal government's prohibiting discrimination against aliens by other employers while practicing it in its own civil service.

Directly in point on the constitutional question is the recently-decided case of Purdy & Fitzpatrick v. State of California, 79 Cal. Rptr. 77, 456 P.2d 645 (1969), where the California Supreme Court en banc held the California statute prohibiting employment of aliens on public works to be violative of the Fourteenth Amendment. The Court first observed that the state may not create arbitrary classifications for the purpose of hiring and firing public employees and that the state could not arbitrarily foreclose to any person the

right to pursue an otherwise lawful occupation. It then went on to say that the statute "arbitrarily discriminates by classifying persons without relation to any permissible purpose of the statute," and pointed out that:

> The fact of alienage bears no relationship either to the suitability of those who work upon public projects or to the need of the laborer for such employment. Indeed, defendant has asserted no intrinsic differences between the alien and the citizen which would render the latter the more proper subject for the employment advantages bestowed by the section." 456 P.2d at 655.

The Court also explicitly came to grips with the real justification that has been advanced for such discrimination in public employment. It stated:

> May the state simply favor its own citizens in the disbursement of public funds? First, since aliens support the State of California with their tax dollars, any preference in the disbursement of public funds which excludes aliens appears manifestly unfair. . . Finally, any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis. The citizen may be a newcomer to the state who has little "stake" in the community; the alien may be a resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state. 456 P.2d at 656.

It treated Heim v. McCall as having been effectively overruled by Takahashi v. Fish and Game Commission, and therefore, overruled the California decisions that were based on Heim v. McCall. It concluded:

> The discrimination involved denies arbitrarily to certain persons, merely because of their status as aliens, the right to pursue an otherwise lawful occupation. The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens from other countries. The latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination." 456 P.2d at 658.

The reasoning of the California Supreme Court should commend itself to this Court in the case at bar.

It must be emphasized that what the plaintiff is challenging is the absolute bar from all civil service employment that is imposed upon resident aliens. Conceivably, citizenship may constitute a bona fide occupational qualification for certain positions in the Civil Service where there is a reasonable relationship between citizenship and the ability or suitability to perform in that position. And conceivably, positions requiring a security clearance or the like can properly be

limited to citizens. (However, the "loyalty" of aliens admitted to permanent residence as a class has been presumed, as evidenced by the requirement that they render compulsory military service. 50 App. U.S.C. § 454). To the extent limitations like these are permissible, the Commission may surely promulgate reasonable regulations imposing citizenship as a requirement for appointment to certain positions. The question presented here is whether the Commission - or the Congress - may constitutionally bar resident aliens from all governmental employment.

The government has argued that it may, and in the Court below has advanced six reasons justifying such exclusion: (1) it is constitutionally permissible to distinguish between citizens and aliens; (2) government employment is a "privilege" which can be reserved to citizens; (3) the government may provide for the economic needs of its citizens through federal employment before it provides for aliens; (4) government employment involves an exercise of sovereignty, in which aliens need not share; (5) other nations limit government employment

to their own nationals; (6) denial of government employment was one of the conditions under which the plaintiff entered the country and he must accept that condition. We will consider these arguments seriatim.

1. It is constitutionally permissible to distinguish between citizens and aliens.

No one would dispute the general proposition provided that the distinction is reasonable and bears a reasonable relationship to the accomplishment of a legitimate governmental objective. It is not constitutionally permissible to impose unreasonable discriminations against aliens. Nielsen v. Secretary of the Treasury, 424 F.2d 833 (D.C. Cir., 1970). To say that the government can distinguish between citizens and aliens begs the question whether it is reasonable for the government to distinguish between citizens and aliens to the extent of absolutely barring the alien from all governmental employment.

Nielsen is a good example of how carefully the courts proceed when a claim of discrimination

based on alienage is made. There this Court emphasized that the distribution of assets to citizens was only temporary and was analogous to the marshalling of assets for the benefit of local creditors. It did not hold that aliens could be permanently excluded from sharing in the assets. Likewise in Fleming v. Nestor, 363 U.S. 603 (1960) where the Court upheld the withdrawal of Social Security benefits from certain aliens, the distinction in question was not between aliens and citizens, but between citizens and resident aliens on the one hand, and deported aliens on the other. Resident aliens, if they had engaged in the prescribed conduct, but had not been deported, continued to receive the benefit. The focal point was not the status of alienage, but residence abroad, which in the view of the Court, could be considered relevant to continued eligibility for social security payments. Classifications between aliens and citizens that do not bear a reasonable relationship to the accomplishment of a legitimate governmental objective are clearly unconstitutional. Truax v. Raich, supra; Nielsen v. Secretary of the Treasury, supra.

2. Government employment is a "privilege" which can be reserved to citizens.

Courts no longer decide constitutional questions on the basis of "privilege-right" distinctions, and as pointed out previously, government employment can no longer be considered a "privilege", justifying the arbitrary denial of such employment to certain classes of persons. It was the "privilege" rationale which was invoked to sustain the exclusion of aliens from public employment in cases such as Heim v. McCall, 239 U.S. 175 (1915), and Crane v. New York, 239 U.S. 195 (1915), and this is precisely why such cases are no longer controlling. Resident aliens, who are entitled to the Fifth Amendment's guarantee of due process of law, Galvan v. Press, 347 U.S. 522 (1954), have a "right" to public employment, unless there are valid reasons for denying such employment to them.

3. The government may provide for the economic needs of its citizens through federal employment before it provides for aliens.

Federal employment in the Civil Service is not part of a welfare program. It may be that the government can provide welfare for its citizens while leaving the resident alien to starve, Rok v. Legg, 27 F.Supp. 243 (S.D. Cal. 1939), although this is not how welfare programs are generally administered. But the economic needs of American citizens have nothing to do with Civil Service. The Civil Service was not established to take care of those citizens who could not obtain other employment (which may have been the case with the "spoil system" that it replaced.) Quite to the contrary, as indicated by the statutory direction to the President:

> The President is authorized to prescribe such regulations for the admission of persons to the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter . . . 5 U.S.C. § 631 (1964).

Since the criteria for appointment relate to ability

and suitability rather than to economic need, providing for the economic needs of citizens cannot furnish a rational or legitimate justification for the exclusion of aliens. The case at bar involves civil service appointment, not welfare legislation, as in Rok v. Legg, supra. The discrimination effected by the present legislation, therefore, bears no reasonable relationship to the purpose for which the federal Civil Service was established and cannot be sustained on the ground urged by the government.

4. Government employment involves an exercise of sovereignty in which aliens need not share.

The appellant does not want to exercise the sovereignty of the United States nor to formulate national policy. He just wants to work as an etomologist, as he is now doing for the Department of Public Health of the State of Ohio (Ohio's sovereignty does not appear to have been diminished as a result). The government has admitted, as indeed it must, that resident aliens are entitled to employment "in the common occupations of the country."

Truax v. Raich, 239 U.S. 33 (1915); Nielsen v. Secretary of the Treasury, 424 F.2d 833, 846 (D.C. Cir., 1970). It is submitted that today employment by the federal government is indeed a "common occupation." The federal government is by far the largest employer in the United States. According to the United States Civil Service Commission, Statistics Section, in June of 1969, federal employment stood at 2,832,100, of whom 2,796,000 were employed by the executive branch. In the three divisions where appellant would be likely to be employed, Agriculture, Interior and Health, Education and Welfare, the figures were 123,701, 74,063 and 111,630 respectively. 1970 World Almanac, pp. 100-101.

Not more than a fraction of such employees can be said to be "exercising the national sovereignty of the United States." The federal government occupies a very important position in the economy, and it is unreasonable to completely deny all federal employment to resident aliens merely because some positions may involve the "exercise of sovereignty." The Civil Service Commission may properly limit

certain positions to citizens where citizenship bears a reasonable relationship to ability or suitability, but it is the height of absurdity to believe that citizenship is a bona fide occupational qualification for 2,832,100 jobs. Secretaries, truck drivers -- and entomologists -- are not exercising sovereignty, but are performing the same tasks for the federal government as they would for any other employer. Considerations of "sovereignty" cannot justify closing off almost 3,000,000 jobs to people solely because of their status as aliens.

5. Other nations limit governmental employment to nationals.

This is indeed true, and it is not contended that such discrimination is contrary to principles of public international law. But it does not follow that the practice of other nations makes such discrimination justifiable under the due process clause of the Fifth Amendment to the Constitution of the United States. In most nations of the world aliens do not have a right to a hearing before they can be deported, and in many nations aliens may not

own land, but this is not the law in the United States. Thin gs are different in the United States, and here the burden is on the government "to put forward the special reasonableness of and justification for any measure discriminating against aliens." Nielsen v. Secretary of the Treasury, supra. The fact that aliens are discriminated against with respect to government employment elsewhere certainly is no justification for such discrimination in the United States.

6. Denial of government employment was one of the conditions under which the appellant entered the country and he must accept that condition.

It cannot be seriously contended that any condition that is imposed upon aliens is ipso facto constitutional. Suppose that it were required that each alien upon his entry execute an affidavit to the effect that, "I will never criticize the government of the United States." Would the fact that he "agreed" to that condition diminish in any way the violation of the First Amendment's guarantee of freedom of expression? To state the proposition is

to refute it. Since the alien is entitled to the protection of the Constitution, he does not by the fact of having been admitted waive his right to contest violations of his constitutional rights.

When all is said and done, the only justification that can be advanced for the exclusion of resident aliens from all government employment is the fact of their status and the belief that there is something "inherently different" about aliens where government employment is involved. The conclusion is inescapable that:

> The discrimination involved denies arbitrarily to certain persons, merely because of their status as aliens, the right to pursue an otherwise lawful occupation. The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States Citizens over citizens from other countries. The latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination." Purdy & Fitzpatrick v. State of California, 79 Cal. Rptr. 77, 456, P.2d 645, 658 (1970).

This kind of discrimination can be sustained only if the premise that government employment may be reserved for citizens is not subject to question, only if there is a "feeling" that it is proper to

limit such employment to citizens precisely because they are such. It cannot be sustained in logic or in law. It cannot meet the standard of "special reasonableness of and justification for any measure discriminating against aliens." Nielsen v. Secretary of Treasury, supra.

It is not consistent with the values expressed in the due process clause of the Fifth Amendment to closs off almost 3,000,000 jobs to people solely because they have not yet attained the status of citizens, not in this nation at this time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to that Court with directions that it grant appellant's motion for summary judgment herein and award such relief as it deems appropriate under the law.

Respectfully submitted,

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October, 1970

BRIEF FOR THE APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,640

MAZHAR JALIL,

Appellant,

v.

ROBERT E. HAMPTON,
Chairman, United States
Civil Service Commission,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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* Authorities principally relied on are indicated by an asterisk.

STATEMENT OF THE ISSUE PRESENTED

Whether the Civil Service Commission may validly exclude resident aliens from admission to competitive examinations for a civil service rating and from appointment to positions in the United States civil service.

Note: This case has not previously been before this Court.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,640

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Appellant, Mazhar Jalil, is a citizen of the Republic of India, who resides in Lexington, Kentucky (App. 2).[1/] He was admitted to the United States for permanent residence on August 8, 1968 (App. 4). Two days after his entry into the United States, Mr. Jalil applied to the Civil Service Commission ("Commission") to be admitted to the competitive

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1/ The reference "App." is to the mimeographed appendix filed by the appellant in this cause.

examination for a Civil Service rating (App. 4). His application was denied by the Commission on the ground that (App. 12):

> Civil Service rules provide in general that we cannot accept applications from persons for rating under civil service unless they are citizens of or owe allegiance to the United States. The term "owe Allegiance to" is applicable only to natives of American Samoa. Unless a person has received his final citizenship papers, he cannot be considered a citizen of the United States for the purpose of competing in competitive civil service examination.

Thereafter, on September 22, 1969, Mr. Jalil brought a class action against the Chairman of the Commission (App. 2-13), seeking declaratory relief to the effect, first, that those provisions of the Civil Service Regulations which disqualify aliens for admission to competitive examination for a civil service rating and for appointment in the civil service (5 C.F.R. 338.101, 302.203(g)) are illegal and void (App. 8); and second, that any provisions in Congressional enactments prohibiting the use of appropriated funds for payment of salaries of non-citizen employees of the Executive Branch are void (App. 9). In addition, mandatory injunctive relief was sought against the Chairman of the Commission directing him to instruct the members of the Commission and its staff that the Commission's regulations disqualifying aliens from entering the civil service are void; to order the Chairman to instruct the Commission's staff to admit aliens to competitive civil service

examination henceforth; and to order the Chairman to instruct the Commission's staff that henceforth, in the administration of the civil service, there shall be no discrimination on the ground of alienage (App. 10-11).

The Government moved to dismiss the complaint for failure to state a claim for relief, and for failure to join indispensable parties (App. 18), and Mr. Jalil cross-moved for summary judgment (App. 19). The court below denied the cross-motion, granted the Government's motion, and dismissed the complaint (App. 22). — The present appeal followed.

STATUTES, EXECUTIVE ORDER AND REGULATION INVOLVED

a) 5 U.S.C. 3301 (1964 ed., Supp. V) provides as follows:

> The President may -
>
> (1) Prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

b) Sec. 502 of the Public Works Appropriation Act, 1970, Pub. Law 91-144, 83 Stat. 336-7, provides in pertinent part as follows:

> [N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post or duty is in continental United States unless such person (1) is a citizen of the United States . . . .

c) Sec. 2.1 of Executive Order 10577, November 22, 1954, 19 Fed. Reg. 7521, provides in pertinent part as follows:

> (a) . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

d) The Civil Service Regulations, 5 C.F.R. 338.101 (1970 ed.), provide in pertinent part as follows:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
> (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States . . . .

ARGUMENT

The issue raised on this appeal is whether the general policy of Congress and of the Executive limiting civil service positions to United States citizens is so utterly arbitrary as to violate the Due Process clause of the Fifth Amendment. Appellant allows that citizenship may "conceivably" constitute a valid qualification for positions "requiring a security clearance or the like" (Br. 15), but he argues that the non-availability of civil service positions in the United States to resident aliens "solely because they have not yet attained the status of citizens" (Br. 26) is unreasonably discriminatory.

We shall show below that the ineligibility of resident aliens for participation in the competitive civil service system does not discriminate against them unreasonably.

A. The Executive and Legislative Determination to Reserve Federal Employment in the Competitive Civil Service to United States Citizens is not an Unconstitutional Discrimination.

1. In addressing itself to the position of aliens in the United States in Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Supreme Court stated:

> Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose. [342 U.S. at 586-587.]
>
> * * * * *
>
> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [342 U.S. at 588-589.]

And in Johnson v. Eisentrager, 339 U.S. 763 (1949), the Court reminded us that —

> It is neither sentimentality nor chauvinism to repeat that "Citizenship is a high privilege." . . .
>
> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right

> against Executive deportation except upon full and fair hearing. . . . [citations omitted.] And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. [339 U.S. at 770-771.]

Alienage has been traditionally recognized as a valid basis for the classification of individuals in law, as distinguished from race, creed, color, or indigence which the Supreme Court has termed "constitutionally an irrelevance." Edwards v. California, 314 U.S. 160, 185 (1941)(Jackson, J., concurring); see, e.g., Clarke v. Deckenbach, 274 U.S. 392 (1927) (aliens excluded from operation of pool and billiard halls); Heim v. McCall, 239 U.S. 175 (1915) (aliens excluded from employment on public works); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (aliens excluded from hunting wild game); see Tussman and tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 375-376 (1949).

While it is established that aliens are entitled to equal employment rights "in the common occupations of the country," Nielsen v. Secretary of the Treasury, ___ U.S. App. D.C. ___, 424 F.2d 833, 846 (1970), government employment has always been recognized as not being in the category of a "common occupation". Thus, in Truax v. Raich, 239 U.S. 33, 40 (1915), the fountainhead of equal employment cases—and the authority relied on by this Court in Nielsen, supra,—the Supreme Court

noted that the Arizona statute struck down in that case "is not limited to persons who are engaged on public work or receive the benefit of public moneys." Federal civil servants both "receive the benefit of public moneys" and "are engaged on public work."

The Constitution is clear in placing control of the institutions of government in the hands of citizens only. For example, to be a member of the House of Representatives one must have "been seven years a citizen of the United States" (Art. 1 § 2); to be a member of the Senate, one must have "been nine years a citizen of the United States" (Art. 1 § 3), and the President must be a natural born citizen (Art. 2 § 1). The resident alien, while he may be personally loyal to the United States, retains an allegiance to the country of his nationality. Harisiades v. Shaughnessy, supra, 342 U.S. at 587. The Congress and the Executive have no obligation to place the carrying out of national policy in the hands of aliens who may, whether they wish to or not, have a split loyalty. The Executive and Legislative Branches have a right to determine qualifications for federal employment. Keim v. United States, 177 U.S. 290, 293 (1900).

2. There are no judicially enforceable rights to federal employment except those secured by statutes Congress has enacted. See, e.g., Eberlein v. United States, 257 U.S. 82

(1921); Crenshaw v. United States, 134 U.S. 99 (1890); United States v. Perkins, 116 U.S. 483 (1886). Government employment is not "property" which is constitutionally protected by the Fifth Amendment. Taylor and Marshall v. Beckham, 178 U.S. 548 (1900); Bailey v. Richardson, 86 U.S. App. D.C. 248, 259, 182 F.2d 46, 57 (1950), aff'd by an equally divided court, 341 U.S. 918 (1950). Congress has the widest possible latitude to establish standards for the selection and retention of employees in the federal civil service.

3. The competitive civil service is an integral part of the Executive Branch of Government and as such its members actively participate both in the making and in the execution of national policy. The Legislative and Executive Branches have a right to determine that the making and carrying out of policy at all levels of Government shall be in the hands of United States citizens. Resident aliens clearly have no constitutional right to make or carry out national policy or to partake in any of the institutions of Government. The almost universal practice of nations requiring that civil servants must be citizens is clear evidence that such classification is not invidious (see infra, pp. 12-15). In fact, it is hard to conceive of anything more reasonable than that in a representative democracy the citizens should constitute the

government, whether it be in the Legislative, Judicial or Executive Branch.

It has been aptly stated that —

> At the very foundation of all independent popular governments lie the principles, the enforcement of which needs the aid of neither statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens, and its powers and functions exercised, only by them and through their agency. [3 Am. Jur. 2d., Aliens and Citizens, §39.][2/]

In the final analysis, the question here is not whether the courts — or, for that matter, the appellant — approve the wisdom of the policy adopted by Congress to exclude aliens from the competitive civil service, but whether a constitutional objection can be raised against the powers of Congress to adopt that policy.[3/] Cf. Morgenthau v. Barrett, 71 U.S. App.

2/ This is simply another way of stating that the constitution establishes government of the people, by the people, and for the people.

3/ The present Federal statutory preference for citizens over aliens in the civil service has its origins in the late 1930's (e.g., Treasury and Post Office Departments Appropriation Act of 1939, 52 Stat. 120), a period of great national economic problems. On the international scene, the turmoil that was to lead to World War II was in full swing. Surely the government has a right to provide for the economic needs of its citizens, through federal employment, before it proceeds to provide for aliens. See Rok v. Legg, 27 F. Supp. 243, 245 (S.D. Cal. 1939); cf. United States v. Pink, 315 U.S. 203, 228 (1942).

D. C. 148, 151, 108 F.2d 481, 484 (1939), cert. denied, 309 U.S. 672 (1939). So long as the classification which Congress has made bears a reasonable relation to the purpose of the legislation, Congress has the broadest discretion to make the statutory classifications. Currin v. Wallace, 306 U.S. 1, 13-14 (1939); Steward Machine Co. v. Davis, 301 U.S. 548, 584-585 (1937).

> The civil service has been called "the one great political invention" of nineteenth century democracy. The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people. Political fortunes of parties will ebb and flow; top policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. [United Public Workers v. Mitchell, 330 U.S. 75, 121 (1947); Douglas, J., dissenting in part.]

4. It cannot, we submit, be seriously contended that restricting civil service positions to citizens of the United

States is unreasonable. Excluding resident aliens — during their probationary period in this country, prior to their becoming citizens — from the "complicated machinery of modern government" has a sound basis, and cannot be compared to the patently arbitrary discrimination condemned in Wieman v. Updegraff, 344 U.S. 183 (1952).[4/]

B. Barring Non-Citizens from Civil Service Positions is a Universal Practice among Nations.

The practice of nations clearly shows that discrimination in favor of citizens in the field of government employment is commonplace. Thus, India, plaintiff's state of nationality,

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4/ Appellant can derive little comfort, we submit, from two recent State cases which he commends to this Court (Br. 12-13). Both Department of Labor v. Cruz, 45 N.J. 372, 212 A.2d 545 (1965), and Purdy & Fitzpatrick v. State, 79 Cal. Rptr. 77, 456 P.2d 645 (1969), were concerned with State statutes prohibiting the employment of aliens by private contractors on public works projects. The New Jersey Supreme Court held in the Cruz case that the local statute, enacted in 1899, had been impliedly repealed by subsequent legislation, and the court expressly declined to reach any constitutional issues. The California Supreme Court in the Purdy case held that the State statute interfered with the comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration and that it offended the equal protection clause of the Fourteenth Amendment.

Neither case dealt with the employment of aliens in the civil service.

"restricts admission to its civil service to Indian (or Sikkimese or Nepalese) nationals." See United Nations Department of Economic and Social Affairs, Public Administration Branch, Handbook of Civil Service Laws and Practices 53 (1966). Dr. Roth, in The Minimum Standard of International Law Applied to Aliens 151-52 (1949) states:

> Under political rights we understand rights which enable the individual to take part in the exercise of the State power, and to participate in any manner in the formulation of the will of the State. It is unanimously agreed that according to common international law the alien may be excluded from the possession of the rights which normally belong solely to the nationals of the State.
>
> * * * * *
>
> In accordance with this general rule, it is furthermore universally recognized that the State of residence may exclude aliens from all public employment, civil or military and from all functions which include a delegation of a part of public power.

The League of Nations Preparatory Documents to the International Conference on the Treatment of Foreigners recognized the special character of government employment and excluded such employment from those areas where it recommended national treatment:

> Each of the High Contracting Parties, however, retains the right to prohibit foreigners within its territory from engaging in the professions, occupations,

industries and trades, hereinafter specified, or to subject their exercise to compliance with certain differential formalities or conditions:

> (a) Public functions, charges or offices of a judicial, administrative, military or other nature which, involving a devolution of the authority of the State or a mission entrusted by the State, shall be reserved to that State's nationals; * * * [League of Nations Doc. C. 36. M. 21. 1929 II.]

The United Nations Handbook of Civil Service Laws and Practices, supra, at 52, shows:

> In the United Kingdom, a person appointed to a post for which a certificate is required from the Civil Service Commissioners (in effect, permanent pensionable posts) must be a British subject, or a British protected subject, or a citizen of the Republic of Ireland and, in addition, if he fulfills this requirement by birth, at least one of his parents must be similarly qualified and, if he does not fulfill it by birth, he must have been resident or employed, for at least five of the preceding eight years, in a Commonwealth country. Appointments of temporary staff may be made more freely, provided suitably equipped local candidates are not available.

In France:

> General conditions of eligibility laid down by law provide that no person may be appointed to a public position unless he is of French nationality, of good moral character, in possession of his civil rights, has fulfilled his legal obligations as regards service in the armed forces, is physically fit for the service to which appointment is sought and certified free from active

> tuberculosis, cancerous or nervous diseases. [Id. at 175.]

In Latin American countries generally:

> Most follow the practice of laying down requirements of nationality, good conduct, health, possession of civil rights, completion of military service and age. [Id. at 259.]

In discussing the selected countries of Libya, Jordan, United Arab Republic, Iran, Somalia, Turkey and Ethiopia, the Handbook notes:

> Restrictions on eligibility for appointment to the Civil Service follow lines met elsewhere. The Civil Service laws restrict recruitment to permanent posts to nationals in all cases except Ethiopia. Here, although there is no absolute requirement of Ethiopian nationality, there is a provision that Ethiopian nationals have preference over others. [Id. at 329.]

We submit that a practice so uniformly followed by other nations of the world can hardly be regarded as palpably arbitrary and irrational.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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THOMAS A. FLANNERY,
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ALAN S. ROSENTHAL,
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Washington, D. C. 20530.

NOVEMBER 1970

Throughout, she has remained outspoken and unrelenting in her advocacy of Marxism and the overthrow of the American economic system.

The remarkable thing is that Dorothy Healey has not only survived, but that she is as tough and bouncy as ever, and much given to laughter.

She has experienced oppression and encirclement, but she regards as myth the idea that there is a monolithic hatred in America for Communists.

"This isn't a totally repressive society," she conceded in an interview. "I'm still here. That's proof of that."

People aware of Dorothy Healey's formidable reputation are astonished when they first meet her. She stands 4 feet 11-3/4 inches ("I insist on that three-quarters") and weighs 90 pounds.

Disarming Charm

She has the face of an amiable barmaid. Quick light hazel eyes, an elfin smile, sandy windblown hair gone to gray. She would not be considered chic by fellow ladies of the PTA, but she has a disarming charm.

Mrs. Healey lives on W. 84th St. in a neighborhood that has gone almost entirely black since she bought the property in the 1940s. She lives alone in a pink stucco cottage at the rear of the lot. Her mother, Mrs. Barbara Nestor, 84, lives alone in the house in front.

Dorothy Healey was divorced from her third husband 12 years ago. Her mother's second husband was deported to Bulgaria in 1956. "Mainly," said Mrs. Healey, "because he was my stepfather."

One might speculate that the neighbors are pleasant to Dorothy Healey for the sake of her mother, who can't help her daughter's being a Godless Communist. If anything, the octogenarian Mrs. Nestor is even more radical than her child.

"Mother is a charter member of the Communist Party," said Mrs. Healey. "She's really a radical. Sometimes when I come home she'll be all upset about something she's heard on the radio and begin lecturing me on the evils of capitalism, waving her arms, and I have to tell her, 'But Mama, I'm already a Communist!'"

Like her mother, Dorothy Healey became a Communist as a young girl.

"I joined the Young Communist League December 1, 1928, she recalled. "I was 14. I never had a moment's doubt what I wanted to do with my life from that point on."

Her father was a ne'er-do-well traveling salesman. The family came to California from Denver when she was 6. She went to 19 different schools.

"My mother was a radical. My father was not. He had the usual decent reactions about oppression, but no understanding of the system, of what caused things to happen."

Though she was influenced by her mother, Dorothy Healey believes it was her early reading of such American writers as Jack London and Upton Sinclair that shaped her life.

"Upton Sinclair, more than anyone else, symbolized for me what happened in a system that gave absolutely not a damn for the human being in the search for profit."

When she was 15 she was arrested for the first time. She was peddling the Daily Worker and making a speech on Oakland's skid row when a police inspector picked her up and carried her off to a patrol wagon. She was sent to a detention home.

"I was in about two weeks. I was more trouble than anything else. I kept agitating the kids in there. Finally they called up my mother and said, 'Come take her. She's driving us crazy.'"

Lifelong Battle

Thus began her lifelong conflict with the system.

When she was 16, Dorothy Healey (her maiden name was Rosenblum) dropped out of high school to go to work in a San Jose cannery as a peach cutter at 15 cents an hour.

She helped organize a union and a strike. It was the first in a series of organizing activities that took her up and down the agricultural valleys of the state and brought her many raps on the head, several arrests and a deepening of her convictions.

During a lettuce strike in 1934 she was arrested and sentenced to six months in the Imperial County Jail.

"We were arrested after a $10,000 reward was posted. Each night we were taken to a different Mexican worker's home. Not one of those starving workers ever turned us in for that reward. We were finally turned in by a man posing as a newspaperman."

She served the full six months.

"They wouldn't even give me a day off for good behavior," she said, laughing, "because I smuggled cigarettes and matches to some boys in the next cell."

She didn't mind jail too much, though, because she was allowed to have books. The other women prisoners, mostly prostitutes, were allowed to have food brought in.

"The food was horrible. They didn't let me have food brought in. They were afraid somebody might smuggle something in to me, but they let me have all the books I wanted. Wasn't that delightful? They didn't care about smuggling in the printed word!"

For three dull years Dorothy Healey labored in the establishment. In 1940 she passed a civil service examination and went to work for the state in San Francisco as a deputy labor commissioner.

In 1941, three days before Pearl Harbor, she was called before the Tenney (State - Un-American Activities) Committee. Her Communist associations were brought out. Gov. Culbert L. Olson asked for her resignation. She refused to quit, holding that nothing in the state personnel code made her Communist Party membership illegal.

"I held the job till my son was born. My family was brokenhearted when I quit. It was the first salary I'd ever received. They thought their little girl was finally taken care of. But I was bored. Bored to tears."

The boredom soon ended. She was elected party secretary in 1945 and came to Los Angeles, buying the house on W. 84th Street.

Only at the very beginning was there any feeling of hostility from the neighbors, and that was rare.

One neighbor used to report everything we did to the FBI. After a few years she simply got disgusted with it. She began to bring us over pies and cakes every day. She decided we were awfully nice people. Really, she didn't care about politics. She didn't understand them."

Sentenced in 1949

It was not until her son reached school age that Dorothy Healey discovered her vulnerability. In 1949, refusing to answer questions before a U. S. grand jury, she was sentenced to 18 months in jail. (The court decision was later reversed.)

"Richard (her son) was 6 or 7. You can imagine what it was like in our neighborhood when the newspapers were headlining the big attacks on Communists, spies and agents of foreign powers.

"And here's a 6-year-old boy growing up. The effect on him was just devastating. But it was years before I really knew it. He felt protective about not telling me. He didn't want to hurt me."

The worst period of her life came in August, 1952, when Dorothy Healey and several other party leaders were sentenced to five years in prison and fined $10,000 each for conspiracy to teach the overthrow of the government by violence.

Unable to raise the $100,000 bail set by the district U. S. judge, Mrs. Healey and the others spent four months in the county jail, until the bail was reduced by a higher court. (The U. S. Supreme Court subsequently set aside her conviction and the indictment was dismissed.)

Getting Fat

"My first real awareness of what was happening to Richard came when I got out of jail," she recalled. "He had started gaining weight, getting fat."

She took him to a pediatrician, a friend, and asked what was wrong.

"It's very simple," he told me. "He's worried. He's scared. And that's why he's eating."

On the way home, she said, Richard told her, "You know, there isn't a night I go to bed that the last thing in my mind isn't, 'Will my mother be there when I wake up in the morning?'"

She said Richard asked why she had to be what she was.

"I can't describe the agony I felt. My son, from the moment he was born, was the alpha and omega of my existence. I am the typical fatuous mother. I thought then—oh, the vulnerability, when you have children.

"So I said to him, 'It's because I love you so much that I do this. You don't have security. It can't be you alone.'"

Even then, Mrs. Healey never considered for a moment getting out.

"No. I really believed what I said. You can't have an island for yourself."

Though the neighbors were kind, her son felt hostility on the school ground.

"Children would refuse to play with him. They were only reflecting their parents. The parents would tell the children not to play with him. Then little things would happen. His first girl friend, in junior high, told him she couldn't go out with him any more. When you look back, you see how much it was to him then."

But there was a bright side to the boy's school experience.

"All the way through, and especially during the Smith Act trial, the teachers were protective and concerned."

In these years Mrs. Healey did her duty by joining the PTA, though she did not always feel welcome, especially when she agreed with the other members on something.

"They wished I wouldn't. They were very uncomfortable. They made no bones about it. Sometimes there was a coincidence of viewpoint. It made it difficult for them.

"But I paid my dues and attended the meetings. Oh, yes. Regularly."

All her life, Mrs. Healey believes, her convictions have set her apart from other people--"Good people, decent people, who could intellectually understand my reasons, but are afraid of too close a relationship."

For years, Mrs. Healey has been speaking to students on college campuses. Sometimes she has been banned; often she has been heckled; but never has she been physically attacked.

She thinks her personal appearances on campuses have a healthful effect "on a whole generation of kids raised on the 'I Led Three Lives' theory of communism as a great conspiracy."

"For the first time they see and hear a communist for themselves," she said. "The hatred is very hard to sustain when it has a human identification."

Aside from the PTA and the party, Mrs. Healey has not been a joiner. She has not often been invited to join women's clubs or other nonparty groups.

"No. That's where the encirclement shows. It's evident everywhere people gather. Social life? I don't have any. I used to play poker. I read."

Her tiny living room is walled in with books, mostly the literature of communism--Marx, Engels and a well-thumbed 30-volume set on Lenin. Mrs. Healey spends her leisure reading in her recliner under a portrait of her son.

Richard Healey, now 25, born of Dorothy Healey's seven-year marriage to Don Healey, is working for his doctorate at UCLA on a fellowship.

"His field is differential algebra," his mother said. "Every time he tries to explain it to me I say, 'Yes, sweetheart.'"

Always a good student, Richard went to Reed College on a scholarship, then on a federal fellowship for graduate work at Tulane University, in New Orleans. He was driving to New Orleans with his father when a letter came from Washington. The fellowship had been withdrawn.

A veterans group had protested the grant, impugning young Healey's loyalty. He had refused to be drafted on the grounds that the Vietnam war was immoral, and had been classified incligible for service.

"When he got to Tulane," said his mother, "the entire math department rallied around him. They were outraged."

Tulane gave Healey an interim grant until a Health, Education and Welfare appeals board voted unanimously to restore the fellowship.

"This is the interesting thing about America," said Mrs. Healey. "My young friends don't understand the contradictions and the nuances of this country. Here is this kid being charged with, first of all, being my son. And after a two-day hearing they agree that guilt by birth should not be held against you."

Young Healey, incidentally, is not and has never been a member of his mother's party.

Devastating Effect

"He is a Marxist," she said. "He's a very thoughtful, intelligent, analytical man."

Today the party membership in Southern California is only 1,000, down from a high of 5,000 in 1949. The decline came after the 20th Soviet Congress, at which Nikita Khruschev opened the door on the Joseph Stalin chamber of horrors.

"You must understand," Mrs. Healey said, "that that had a more devastating effect on Communists than it had on non-Communists. I'll never forget the night I heard that report read. I sobbed all night long. We had just never believed these stories.

"It made me all the more determined that one had to fight for a definition of what socialism is, and what the role of the Communist Party is."

If Mrs. Healey feels much rancor, looking back, she conceals it.

"The most overwhelming problem always to deal with is this charge of being a foreign agent, that you're not an American; that you can't possibly respond to and reflect American culture, American history, American values, because of the myth that you are an agent of the Soviet Union."

Mrs. Healey points out that she took the oath of allegiance when she ran for county assessor in 1966. (She got 87,500 votes.)

"But I want to see the economic system overthrown," she said. "Make no bones about that."

Among the "contradictions and nuances" of America, in Mrs. Healey's mind, is the bugging of her home and office.

"I know my home is tapped," she said. "I have it verified when young people come to see me. I try to meet them at the door and warn them not to say their names. Well, I fail. They come in and say their names.

"In case after case, their parents are visited and threatened with the loss of their jobs if their children come back any more to see me."

Mrs. Healey said she keeps a pencil and tablet handy so names can be written down, but aside from that precaution she ignores it.

"You become totally oblivious. You can't live with it."

She has played games with those she believes are watching her, she said, and at times it has even become a sort of neighborhood sport.

"Once, when a car was following me down to the office, I started darting in front of street cars and making crazy left turns just to see if I could loose them. Later I got a phone call from a man who said, 'This is just a job for us. For God's sake will you stop jeopardizing your life and ours!"

Mrs. Healey said the neighbors like the attention she is paid.

"They feel we have the best protected block in town. They're always thrilled, too, when the television people come out to the house for an interview. They just love it. I'm <u>their</u> Communist!"

Mrs. Healey doesn't think being an atheist has hurt her with the neighbors, either.

"I don't think religion is the most important question. When people know you as a human being it's very hard to apply a stereotype."

Communist party headquarters, where Mrs. Healey works, is only a mile from her house. It consists of two very small rooms, upstairs and to the rear of a rundown two-story stucco building on Manchester Blvd. There are two or three scarred desks and a mimeograph machine and stacks of literature. The rent is $75 a month. Mrs. Healey is the only occupant. The downstairs stores are vacant.

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May 27, 1969

Mr. William B. Ray, Chief
Complaints and Compliance Division
Federal Communications Commission
Washington, D. C. 20554

Re: Dorothy Healey v. KTTV (8330-M; C4-85)

Dear Mr. Ray:

This is in response to the letter of May 1, 1969, from Metromedia, Inc., to you regarding the above entitled matter. We suggest to you that the position taken therein is entirely without support for each of the following reasons:

1. Even though the broadcast was during what was otherwise a news broadcast, it was the editorial portion thereof involving the statement of opinions.

2. It did involve matters of controversial nature and of public importance. The role played by individual communists in our society has been a matter of great public concern as the constant attention of congressional committees, the Justice Department and other branches of government indicates. The article in The Times which was criticized by Mr. Putnam was used by him as a vehicle for the propositions that the Communist Party and every member thereof, or at least every officer thereof, is unpatriotic, lacks integrity and supports terror and the wiping out of populations. Whether or not this is true is certainly a matter with which the public is concerned. Mrs. Healey takes the position that it is not true. Mr. Putnam has taken the position that it is true.

3. It seems clear that in taking his position Mr. Putnam used Mrs. Healey and personal attacks upon her as the means of stating his position on this controversial issue. The fact that it was done by clear implication in the language used rather than by direct statements do not make the attacks any less personal attacks, which Mrs. Healey should have an opportunity to answer. If a commentator could say by implication what he could not say directly and escape being answered, then the whole purpose of the fairness doctrine would be defeated. And indeed the whole law of libel to which the

fairness doctrine has a close relationship indicates that calumny by implication is just as much to be condemned as its direct counterpart.

4. I do not agree that Tri-State Broadcasting Co., Inc., 3 Pike & Fischer R.R. 2d 175, holds that personal attacks upon communists are outside the fairness doctrine. There is nothing either in the rule or in the decision which requires such a conclusion. In the cited case there was a general discussion of means of effectively combatting communism and the commission specifically pointed out that there was no known communist or person ready to express the communist viewpoint in the community. Here the case is entirely different because the person directly attacked is the one requesting the right to reply.

We hereby renew our request contained in our letter of March 26, 1969, concerning the above matter.

Very truly yours,

BEN MARGOLIS
for
MARGOLIS and McTERNAN

BM:rlp

cc: Mr. Thomas J. Dougherty
Assistant Secretary
Metromedia, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D. C. 20016

Mrs. Dorothy Healey

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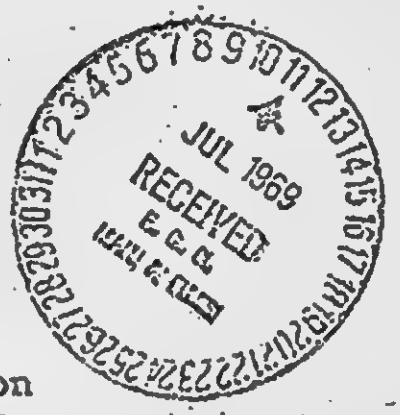
July 8, 1969



Mr. William B. Ray, Chief
Complaints and Compliance Division
Federal Communications Commission
Washington, D. C. 20054

Re: Dorothy Healey v. KTTV (8330-M; C4-85)

Dear Mr. Ray:

We last wrote to you concerning the above matter under date of May 27, 1969. Since then we have heard nothing further concerning our request for action. I need hardly call your attention to the recent United States Supreme Court case of Red Lion Broadcasting Co. v. FCC as upholding the policy of the "Fairness Doctrine."

We again request your early attention to this matter.

Very truly yours,

BEN MARGOLIS
for
MARGOLIS and McTERNAN

BM:rlp

cc: Mr. Thomas J. Dougherty
Ass't Sec'y, Metromedia, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D. C. 20016

Mrs. Dorothy Healey

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FCC 70-653

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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June 24, 1970

IN REPLY REFER T

JUL 2 1970

3300

Mrs. Dorothy Healey
c/o Ben Margolis, Esquire
Margolis and McTernan
3175 West Sixth Street
Los Angeles, California 90005

Dear Mrs. Healey:

This is in reply to your letter of complaint dated March 26, 1969, against Metromedia, Inc., the licensee of Station KTTV-TV, Los Angeles, California. You allege that on February 17, 1969, Station KTTV-TV broadcast some comments by a newsman, George Putnam, during a news program which attacked your "honesty, character, integrity, or like personal qualities" within the meaning of Section 73.679(a) of the Commission's Rules, and that the station has violated this rule by rejecting your request for an opportunity to respond. The comments were directed to a front-page article on you in the Los Angeles Times, of February 16, 1969, entitled "Patriot-Marxist -- No. 1 Red Finds That U. S. Isn't All Bad."

The Times article, after noting that you are "a Marxist, a Communist, and an atheist," states that "in some ways Dorothy Healey might be considered an exemplary American and a good member of the bourgeoisie;" that "at 54, she runs her home, pays her taxes, cares for her aged mother, dotes on her scholarly son and generally likes folks, young and old; and that she professes a sincere patriotism and for years, while her son was in school, rarely missed a meeting of the PTA." The article further states that "she has been investigated, prosecuted and persecuted;" that "her house, she says, is bugged, her phone tapped and her mail examined;" and that, according to her, in case after case, the parents of young people who come to her ". . . are visited and threatened with the loss of their jobs if their children come back any more to see me."

Roughly, half of Mr. Putnam's commentary consisted of reciting the Times article, including all of the foregoing. The other portion of the commentary reflected Mr. Putnam's vigorous and complete disagreement with the Times' story and its use of the term "Patriot" in relation to you. Mr. Putnam states, after reciting Communist horrors and your expressed desire to see the American economic system overthrown, that the article

is "an insult to American patriotism," and that Mrs. Healey while "she may be the Los Angeles Times' kind of patriot . . . sure as hell is not [his]." The commentary also states that the visitor intimidation allegation is an "unsubstantiated charge" concerning an activity which ". . . just doesn't happen in the United States of America."

The licensee asserts that Mr. Putnam's statements concerning you do not constitute personal attack; that the Putnam commentary comes within the exemption of the personal attack doctrine in that it was made during the course of a news broadcast; that, as a Communist, you do not have the right to time to reply, citing Tri-State Broadcasting Co., Inc., 40 FCC 508 (1962), and Storer Broadcasting Co., (DuBois Clubs), 11 FCC 2d 678 (1968); and finally that the personal attack doctrine does not apply because the commentary was not made "during the discussion of a controversial issue of public importance."

Complainant, on the other hand, argues that personal attack was made by implication; that commentary, although given during a news broadcast, was an "editorial portion thereof involving the statement of opinions;" that the role played by you as a Communist is a matter of a "controversial nature and of public importance" (e.g., alleged lack of patriotism; absence of integrity), and that the Tri-State Broadcasting Co., Inc. case is inapplicable because here an individual communist was attacked.

First, it is clear that the personal attack rules are in any event inapplicable. The rules specifically exempt from their scope commentary which is part of a bona fide newscast. That is the situation here.

The matter thus turns on the applicability of the fairness doctrine to Mr. Putnam's commentary. Under established policy (see Report and Order 12 FCC 2d 250, 252-3, par. 5 (1968)), the licensee itself may present the contrasting viewpoint. For example, a licensee which had reasonably discussed both sides of an issue in its programming, could add a short editorial stating its viewpoint on the issue, without being required to extend opportunities for discussion.

With this as background, we turn to the facts of this case. First, we note the licensee's judgment that the matter which you claim to be a controversial issue of public importance--the role played by you as a Communist--is not an issue of public importance in its area. In this connection, we have considered a second factor--that Mr. Putnam devoted considerable time in his commentary to reciting your views as expressed in the Times article (i.e., nine out of 19 paragraphs in his commentary). We wish to make clear that we do not believe that fairness can be

achieved by relying upon the person making the criticism or attack to present the other side. See Red Lion Broadcasting Co. v. F. C. C., 395 U. S. 367, n. 18, quoting J. S. Mill, On Liberty 32. If this were the sole issue in the case, we would not therefore accord it decisional significance. However, here it is not the sole issue. We believe that we can take the above noted factor into account in evaluating the need for action in this case, and specifically, whether we should find unreasonable the licensee's judgment as to the public significance of your role as a Communist, in circumstances where your views have been put before the public to a significant extent. The combined force of these considerations (i.e., the showing (or lack thereof) before us on controversial issues of public importance; the devotion of significant time to setting forth your views, indeed to an unusual extent in this kind of critical commentary) leads us to conclude that no further action is warranted. Under a standard of reasonableness, a case such as this should, we believe, be resolved in the licensee's favor. We stress that the matter is one of applying the standard of reasonableness to the facts of the case--and not what the complainant, or the Commission, or some other entity might have done or preferred in the exercise of their discretion.

Accordingly, your request is denied.

Commissioner Bartley concurring in the result; Commissioners Cox and Johnson dissenting and issuing separate statements.

BY DIRECTION OF THE COMMISSION

Ben F. Waple

Ben F. Waple
Secretary

Dissenting Statement of Commissioner Kenneth A. Cox

I cannot agree either with the majority's result or the very brief and inadequate rationale they have advanced to justify it. I therefore dissent.

I agree that the personal attack rules do not apply here because the attack complained of took place during a newscast, which brings it within an express exemption to the rules. However, when we added the exemptions, we made it clear that the basic fairness doctrine applies to personal attacks in newscasts and other exempt programs. See 12 FCC 2d 250 at 252-253 and Note to the revised rule. So KTTV should permit Mrs. Healey to respond to Mr. Putnam's comments if the latter constituted an attack upon her "honesty, character, integrity or like personal qualities" and if they were made "during the presentation of views on a controversial issue of public importance."

The majority tacitly concede that what Mr. Putnam said constituted a personal attack upon Mrs. Healey. Indeed, it is clear that he charged her with being unpatriotic and with lying in claiming that parents of young people who have visited her are visited and threatened with the loss of their jobs if their children continue their visits. These are obviously attacks upon her character.

The only remaining question is whether the attack was made in the course of presenting a controversial issue of public importance. The majority do not rule that it was not. They recite the licensee's claim that the commentary was not made during the discussion of a controversial issue, but do not find that contention to be valid. Instead, they quickly turn to a "second factor -- that Mr. Putnam devoted considerable time in his commentary to reciting .../Mrs. Healey's/ ... views as expressed in the Times article.". Of course, they immediately go on to say that they "do not believe that fairness can be achieved by relying upon the person making the criticism or attack to present the other side." I agree with that, and with their further statement that if this were the sole issue it would not be of decisional significance.

At this point it seems clear to me that logic and justice require them to return to the disputed question of whether the attack took place in a controversial issue setting, thus giving rise to a right of reply. But they never face that issue. Instead they say, without explanation or citation of authority, that they can take "the above noted factor" -- that is, that Mr. Putnam recited Mrs. Healey's views -- into account in evaluating the "need for action in this case." I know of no other personal attack case in which we have ever talked of the "need for action." Rather, we have simply taken the facts and ruled whether the words spoken amounted to an attack and whether they were uttered in connection with a controversial issue. If these questions are answered in

the affirmative, then the fairness doctrine holds that there is, indeed, a "need" to redress the situation so that the public can hear both sides of the dispute. But the majority are resolutely determined not to proceed in the normal way and in accordance with our precedents because they do not like the result which such a course dictates.

So they press ahead, stating that this "factor" -- though not itself decisionally significant -- can be used in some mysterious way to decide whether to question the licensee's judgment as to the public significance of Mrs. Healey's role as a Communist. Mr. Putnam's recital could not achieve fairness, and I fail to see that it has any relevance to the question of whether he was engaged in discussing a controversial issue. Indeed, the majority do not really use it to decide that question. They simply restate this whole fuzzy concept once more, as follows:

> "The combined force of these considerations (i.e., the showing (or lack thereof) before us on controversial issues of public importance; the devotion of significant time to setting forth ... /Mrs. Healey's/ ... views, indeed to an unusual extent in this kind of critical commentary) leads us to conclude that no further action is warranted. Under a standard of reasonableness, a case such as this should, we believe, be resolved in the licensee's favor."

I think this is sheer obfuscation. What is the "showing (or lack thereof) on the question of whether a controversial issue was involved here? The majority never say. Why does the fact that significant time was devoted to Mrs. Healey's views -- simply so Mr. Putnam could criticize and ridicul them, which the majority say is not, by itself, of decisional importance -- even when added to the licensee's mere claim that no controversial issue was presented, lead to a decision to take no action? It is not even remotely clear to me, and the majority offer no explanation. This all seems to me like prestidigitation -- now you see it, now you don't -- rather than a proper statement of the grounds for agency action. Or to use another metaphor, the majority add zero to zero and get infinity.

I think all of this is intended to obscure the fact that Mr. Putnam's attack was in connection with two controversial issues of public importanc First, there was controversy over the question of whether a Communist can, at the same time, be a patriotic American. Second, there was controversy over the claim that Mrs. Healey had been subjected to surveillance and that parents of young people who visited her were threatened with loss of their jobs. That these issues were of public importance is evidenced by the fact that the Los Angeles Times devoted a front page story to

these matters which occupied eight single spaced typed pages in the item presented to the Commission. It is further demonstrated by the fact that Mr. Putnam, the following evening, spent substantial time disputing the viewpoint of the Times' story and ridiculing and attackin Mrs. Healey. A typed transcript of his comments runs to two and a half single spaced pages. 1/ It seems only reasonable to assume that these two major media of communications in our second largest city would not devote so much attention to these issues if they were not of importance in the community. And I think most people would agree that these questions are intrinsically as important as many others which we have found to call for application of the fairness doctrine. So on the critical question of whether or not Mr. Putnam's attacks took place in the context of a significant controversial issue, I think the answer must be in the affirmative. I certainly find no persuasive justificatio for a contrary view in the majority's opinion.

The licensee cites Tri-State Broadcasting Co., Inc., 40 FCC 508 (1962) and Storer Broadcasting Co., 11 FCC 2d 678 for the proposition that Mrs. Healey, as a Communist, does not have a right to time for reply. The Storer case is clearly not in point -- in fact, we ruled that an organization charged with being under Communist dominance did have a right of reply. The Tri-State case is somewhat ambiguous, containing a sentence which reads: "As you know, it was not and is not the intention of the Commission that you make time available to communists or the communist viewpoint." However, I was the Chief of the Broadcast Bureau when the letter to Tri-State was written and recall the matter clearly. We had received a complaint -- one of a number involving the same kind of situation -- that the station had broadcast a half-hour film entitled "Communist Encirclement - 1961" which was alleged to be a vehicle for "ultra-rightist dogma." The Commission revieved a transcript of the program and said:

> "It appears that the program contained a discussion of the following matters, among others: socialistic forms of government were viewed as a transitory form of government which lead eventually to communism; that this country's continuing foreign policy in the Far East and Latin America, the San Francisco student riots, the alleged infilcration of our government by communists and the alleged moral weakening in our homes, schools and churches have

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1/ It is clear that a good deal of Mr. Putnam's animosity was directed toward the Times. However, I don't think Mrs. Healey should be injured in this cross-fire and left without recourse, nor should the audience of KTTV be left with only one side of the controversy.

> all contributed to the alleged advance of international communism. We are of the view that these matters raise controversial issues of public importance."

When queried about the matter, the station -- like others which had presented similar programs -- responded that it regarded the film as anti-communist and that it did not believe the Commission wanted it to put Communists on in reply. However, there was no suggestion that the complainants in cases of this kind were Communists -- they simply disagreed with the version of recent history reflected in films of this kind and with the conclusions drawn therefrom as to the policies the United States should pursue. It was in this context that the Commission wrote the sentence first quoted above, then going on to say:

> "You will recognize, however, that there are varying views existent with respect to the most effective and proper method of combatting Communism and Communist infiltration and that broadcasts of proposals supporting one method raise the question whether reasonable opportunity has been afforded for the expression on the station of opposing viewpoints."

Thus, the Commission was simply saying that there was no obligation to make time available for the Communist viewpoint in that case. It was not announcing a general policy that Communists can never have a right to present their point of view under any circumstances. Indeed, I think any policy which barred them from responding to personal attacks would violate the First Amendment. While in many communities -- and on many issues -- there may not be a significant Communist viewpoint entitled to air time under the Fairness Doctrine, there may be situations in which the public should hear that point of view along with those of other significant elements in the community. But I think the situation is different when a licensee directly attacks individual Communists, and I believe that the public should hear Mrs. Healey's side of the controversy over whether she, as a Communist, can also be a patriotic American and whether she and her visitors have been subjected to surveillance. 2/ The majority do not appear to rely on the Tri-State case here.

2/ It should be made clear that, if given time, Mrs. Healey should confine herself to the attacks against her by Mr. Putnam and would not be allowed simply to espouse communism. The licensee can reasonably insist that any response deal with the specific issues raised -- the redeeming "patriotic" qualities of a Communist such as Mrs. Healey and the alleged surveillance treatment accorded such people. Radio Albany, Inc. (WALG), 40 FCC 632 (1965); Storer Broadcasting Co., supra.

I am at something of a loss to understand the majority's viewpoint. Certainly their letter does not clearly state a basis for their result in anything like the way we normally handle such matters. I think that they have arbitrarily departed from our usual policies simply because of the identity of the complainant. They do not like Communists and recoil from the prospect of ruling that a station should be required to provide time for one. I certainly have no desire to see the airwaves flooded with Communist propaganda, but I think the whole Fairness Doctrine may be imperiled if we do not administer it with complete evenhandedness. Heretofore, we have been at pains to make clear that our fairness policies apply to both extremes of the political spectrum. Compare Storer Broadcasting Co., supra, with John Birch Society Complaint, 11 FCC 2d 790. See, also, Capitol Broadcasting Company, Inc., 40 FCC 615 and compare Mid-Florida Television Corporation, 40 FCC 620, 631. If we do not continue this course, I think the courts will question our competency to enforce the vital requirement that broadcast facilities be used as means for providing the American public with information on both sides of controversial issues of public importance. Metromedia deliberately permitted use of KTTV for an attack upon Mrs. Healey's character in the context of such public controversy. It thereby incurred obligations under the Fairness Doctrine which should be enforced, in accordance with our precedents, even though she is a Communist.

I therefore dissent and am attaching (as Appendix A) a form of letter which I think should have been dispatched to the licensee.

Appendix A

(Preferred Form of Letter)

Metromedia, Inc.
Licensee of Station KTTV
5151 Wisconsin Avenue, N. W.
Washington, D. C. 20016

Gentlemen:

This is in further reference to the complaint of Mrs. Dorothy Healey concerning the comments of Mr. George Putnam on the February 17, 1969 news program, broadcast by station KTTV, Los Angeles, California. The comments were directed to a front-page article on Mrs. Healey in the Los Angeles Times, of February 16, 1969, entitled "Patriot-Marxist--No. 1 Red Finds That U. S. Isn't All Bad."

The Times article, after noting that Mrs. Healey is "a Marxist, a Communist, and an atheist," states that "in some ways Dorothy Healey might be considered an exemplary American and a good member of the bourgeoisie; that "at 54, she runs her home, pays her taxes, cares for her aged mother, dotes on her scholary son and generally likes folks, young and old; and that she professes a sincere patriotism and for years, while her son was in school, rarely missed a meeting of the PTA." The article further states that "she has been investigated, prosecuted and persecuted; that "her house, she says, is bugged, her phone tapped and her mail examined;" and that, according to her, in case after case, the parents of young people who come to her"... are visited and threatened with the loss of their jobs if their children come back any more to see me."

Mr. Putnam's commentary disagrees entirely with the Times' story and its use of the term "Patriot" in relation to Mrs. Healey. Mr. Putnam states, after reciting Communist horrors and Mrs. Healey's expressed desire to see the American economic system overthrown, that the article is "an insult to American patriotism," and that Mrs. Healey, while "she may be the Los Angeles Times' kind of patriot . . . sure as hell is not /his/." The commentary also states:

> Mrs. Healey makes the following unsubstantiated charge--a charge it is doubtful even she believes--but the LOS ANGELES TIMES publishes it at face value. She says, and I quote, "In case after case, the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." Come, come now, Dorothy--perhaps under Communism--perhaps under the Nazis--but it just doesn't happen in the United States of America.

Metromedia, Inc. (Station KTTV)

The licensee asserts that Mr. Putnam's statements concerning Mrs. Healey do not constitute personal attack; that the Putnam commentary comes within the exemption of the personal attack doctrine in that it was made during the course of a news broadcast; that, as a Communist, Mrs. Healey does not have the right to time to reply, citing Tri-State Broadcasting Co., Inc., 40 FCC 508 (1962), and Storer Broadcasting Co., (DuBoisClubs), 11 FCC 2d 673 (1968); and finally that the personal attack doctrine does not apply because the commentary was not made "during the discussion of a controversial issue of public importance."

Complainant, on the other hand, argues that personal attack was made by implication; that commentary, although given during a news broadcast, was an "editorial portion thereof involving the statement of opinions;" that the role played by Mrs. Healey as a Communist is a matter of a "controversial nature and of public importance" (e.g., alleged lack of patriotism, absence of integrity), and that the Tri-State Broadcasting Co., Inc. case is inapplicable because here an individual communist was attacked.

First, we hold that the personal attack rules are inapplicable. The rules specifically exempt from their scope commentary which is part of a bona fide newscast. That is the situation here. The issue thus turns on the applicability of the fairness doctrine to Mr. Putnam's commentary.

The Tri-State ruling does not make the fairness doctrine inapplicable to this situation. The thrust of that ruling is that licensees are not acting unreasonably when they make the judgment that reference to Communism, in and of itself, does not create a controversial issue of public importance. When speaker in a talk or religious program asserts that a totalitarian form of government--for example, Communism or Fascism or anarchy--is bad, there may be small numbers of people who espouse such doctrines. But the existence of such small groups does not mean that one side of an issue of "public importance" (Sec. 315(a) 47 USC 315(a) has been presented. Cf Letter to L.M.C. Smith, 40 FCC 54 (1963). The letter to Tri-State goes on to hold that an allegedly anti-communist program involved controversial issues as to the best methods of combatting communism and that reasonable opportunity should be provided for opposing viewpoints thereon.

But that is the extent of Tri-State ruling. It did not hold that no matter what the facts, a Communist could never be given access to broadcast facilities; that there can never be a personal attack or controversial issue of public importance involving a Communist. With this as background, we turn to the specific facts here.

The Los Angeles Times story does not deal with the issue of Communism per se. It identifies Mrs. Healey as a high, long-time Communist official and then goes on to raise two issues: (1) whether a Communist such as Mrs. Healey can still have other redeeming "patriotic" qualities, such as being a PTA supporter, etc.; (2) how Communists such as

Mrs. Healey are treated (i.e., her allegations of phone tapping, mail examination and intimidation of visitors).

Mr. Putnam, in his broadcast directed to this news story, stated forcefully his position that such a Communist official could not be regarded in any way as "patriotic" or having other "patriotic" qualities and that Mrs. Healey was lying in her allegations concerning such matters as visitor intimidation. It would thus appear that, as a result of the Times' page 1 story and Mr. Putnam's broadcast, issues of public importance have been raised, and that the public should have the opportunity to hear the contrasting viewpoint. The licensee was therefore under an affirmative obligation to encourage and implement the presentation of that viewpoint.

In the circumstances, the licensee cannot properly reject Mrs. Healey on the grounds which it stated. It is her "redeeming qualities" or "patriotism" which Mr. Putnam has put in issue, and it is her statement of the issue as to visitor intimidation, etc., which Mr. Putnam disputes, and indeed claims that Mrs. Healey herself does not believe. On these facts, demonstrating Mrs. Healey's "..personal involvement in the controversy" (Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1252 (1949)) Mrs. Healey is clearly the appropriate person to respond (see Report and Order, 12 FCC 2d 250, 252-3, para. 5 (1968)) and cannot be rejected on the grounds that she is a Communist. For, under the cited policy, if the licensee does not itself fairly present the contrasting viewpoint, it must afford the person attacked a reasonab opportunity to do so.

In this connection, we also note that no spokesman for the contrasting viewpoint is here entitled to use the opportunity simply to espouse Communism. As stated, that is not the issue; the controversy between the Los Angeles Times story and Mr. Putnam's broadcast is not concerned with the merits of Communism. The licensee can reasonably insist that any response deal with the specific issues raised--the redeeming "patriotic" qualities of a Communist such as Mrs. Healey and the alleged nature of the surveillance treatment accorded Communists such as Mrs. Healey. Radio Albany, Inc. (WALG), 40 FCC 532 (1965); Storer Broadcasting Co., (DuBois Clubs), supra. In that connection, we stress, as we have on prior occasions, that the Commission does not and cannot determine the truth of such issues, and is not indicating any position in that respect. We are not the national arbiter of truth. The Commission's function is simply to insure that in a case such as this, where the licensee has chosen to present one side of an issue of public importance, the public be given the opportunity to hear the other side, and thus be informed, so it--not a Government agency such as the Commission--will make whatever judgment is called for.

Metromedia, Inc. (Station KTTV)

In view of the foregoing, we find that the licensee has not complied with the requirements of the fairness doctrine. We therefore direct that you respond within 30 days as to what steps you have taken to come into compliance.

BY DIRECTION OF THE COMMISSION

Ben F. Waple
Secretary

Dorothy Healey

[In re Fairness Doctrine complaint filed against KTTV-TV, Los Angeles, California, on behalf of Mrs. Dorothy Healey, Southern California Chairman of the Communist Party.]

Dissenting Opinion of Commissioner Nicholas Johnson

In its continuing battle against an "overdose of tolerance," 1/ this Commission has shown a marked disinclination to extend the protection of the Fairness Doctrine to "unpopular" causes. 2/ The Communist Party is a leading example of a group which the Commission has singled out as particularly undeserving of the right to verbal self- defe

In 1962 the Commission found that allegations of [illegible] of communist "infiltration" of government, churches, homes and schools did "raise controversial issues of public importance"--but hastened to assure the public that the Commission certainly did not intend to 'make time available to communists or the communist viewpoint." 3/ In 1968, however, we held that while Communists could not invoke the Fairness Doctrine, groups accused of being communist could--presumably because the seriousness of the allegation entitled the maligned group to 'clear its name." 4/ Today we hold that broadcasters may accuse named individuals of lying and other "unpatriotic" behavior--so long as those individuals are members of the Communist Party--and that the persons attacked have no right of reply. This is discrimination inconsistent with the Fairness Doctrine and the Constitution.

I dissent.

On February 16, 1969, the Los Angeles Times published a front-pa feature article on Mrs. Dorothy Healey, long-time Chairman of the South California branch of the Communist Party. The following day, television KTTV-TV in Los Angeles broadcast what can only be described as a vicious attack on the character, motives and actions of Mrs. Healey. The full flavor and implication of this "commentary" can only be obtained by reading the text in its entirety. (See Appendix.) Pertinent excerpts from Mr. Putnam's monologue, however, follow:

> Now listen, if you will, to just a portion of what the LOS ANGELES TIMES has to say about their front page patriot, Dorothy Healey. 'In some ways," says the TIMES, 'Dorothy Healey might be considered an exemplary American--she owns her home, pays her taxes, cares for her aged mother, dotes on her scholarly son. She professes a sincere patriotism, and she rarely missed a meeting of the P.T.A."
>
> * * *
>
> Mrs. Healey tells of the night she heard the report read concerning Joseph Stalin's horrors. The report released by Nikita Khrushchev. And Mrs. Healey tells the TIMES that she sobbed all night long. She just never believed those stories.
>
> One can't help but wonder if she might have lost another night's sleep had Khrushchev told us of his own extermination of millions of Ukrainians by systematic starvation. Wonder if she ever heard about that?
>
> * * *
>
> Well, in that lengthy and boring TIMES story she tells of her home and her office being bugged--of telling her visitors never to mention their names when they visit her. Actually, Mrs. Healey should be right at home with such tactics--because they're all too commonplace among the Communists.
>
> * * *

> Mrs. Healey makes the following unsubstantiated charge--a charge it is doubtful even she believes--but the LOS ANGELES TIMES publishes it at face value. She says, and I quote, "In case after case, the parents of young people who have visited her are visted and threatened with the loss of their jobs if their children come back any more to see her." Come, come, now Dorothy--perhaps under Communism--perhaps under the Nazis--but it just doesn't happen in the United States of America.
>
> * * *
>
> Dorothy Healey may be the LOS ANGELES TIMES' kind of exemplary American, who professes sincere patriotism--she may be the LOS ANGELES TIMES' kind of patriot--but she sure as hell is not mine. And, my fellow Americans, I trust she is not yours. 5/

Mrs. Healey filed a Fairness Doctrine complaint approximately one month later, March 26, 1969, stating that the licensee had refused to grant her time to reply to Mr. Putnam's attack, and asking the Commissio for relief. Now, one and a half years later, we deny that relief.

In its decision, the Commission majority makes two argument first, that the role played by Mrs. Healey as a Communist is not a controversial issue of public importance; and second, that Mr. Putnam to some extent presented Mrs. Healey's viewpoint (and therefore lessened KTTV-TV's Fairness Doctrine obligation) by quoting favorable portions from the Los Angeles Times article. Both these arguments are faulty.

The portions of Mr. Putnam's remarks set out in the text raise at least two issues of fundamental public importance and controversy. The first is whether mere membership in a particular

organization, such as the Communist Party, is sufficient to justify the inference that the person in question therefore possesses an undesirable character. Thus, Mr. Putnam indicates that Mrs. Healey is a member of the Communist Party, and because of that: (1) she is a liar [who makes "unsubstantiated charges"]; (2) she is guilty of hypocrisy and deceit [e.g., attending P. T. A. meetings under the guise of concern for her son]; (3) she is callous and cruel [failing to lose sleep over Khruschev's "extermination of millions"]; (4) she is implicated in illegal conduct [buggi wire-tapping, etc.]; and (5) she is generally not a "patriot." The importan point to note is not just that the remarks comprise a personal attack on the honesty, character, integrity or like personal qualities of Mrs. Healey Healey, an identified individual. Rather, the remarks attack Mrs. Healey because of qualities that presumably adhere to all members of her organization. There is a word for this technique, and that is "guilt by association." Thus, Mr. Putnam accuses Mrs. Healey of close familiar with tactics of illegal eavesdropping or "bugging" by saying: "Actually, Mrs. Healey should be right at home with such tactics--because they're all too commonplace among the Communists." (Emphasis added.) And later: "Come, come, now Dorothy--perhaps under Communism--perha under the Nazis--but it just doesn't happen in the United States of America." (Emphasis added.)

There is little question that individual character guilt imputed fr mere association with the Communist Party has been one of the most

controversial issues our country has ever faced. The McCarthy purges in the 1950's pilloried thousands of school teachers, ministers, labor union leaders, screen writers, government officials, and members of the military, not for what they had done (in most cases they had done nothing and were in all other respects exemplary citizens), but for what they had joined. Unfortunately the scars of that dreadful era have by no means healed. One need only consult the daily newspapers to find [illegible] teachers being dismissed because of Communist Party [illegible] affiliation. [illegible] See New York Times, June 20, 1970, p. C-59, cols. 1-4 (Professor Angela Davis, University of California at Los Angeles).

Supreme Court decisions during the past twenty years provide perhaps the clearest evidence that the consequences of mere Communist affiliation are, indeed, a "controversial issue of public importance." In a famous line of cases, the Court has ruled that persons cannot be disqualified from employment or subjected to other forms of harrassment merely because they have at one time been members of the Communist Party. More must be shown--namely, that the goals of the organization are illegal; that the individual knew of such goals; that the individual member had the specific intent to further those goals; and (most importan that the individual took some action to further those illegal goals. See, e.g., Scales v. United States, 367 U.S. 203 (1961). Dozens of cases, therefore, have established one of our nation's most important principles

of individual liberty and association: that the "cherished freedom of association" cannot be abridged by sanctions which punish those "who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities. . . ." Elfbrandt v. Russell, 384 U. S. 11, 11 (1966). Illegal activity cannot be imputed to a person fo mere membership in any particular organization. See, e.g., United States v. Robel, 389 U. S. 258 (1967) (defense plant employees); Keyishian v. Board of Regents, 385 U. S. 589 (1967) (school teachers); Schware v. Board of Bar Examiners, 353 U. S. 232 (1957) (attorneys); see generally, Scales v. United States, 367 U. S. 203 (1961).

The point is simply this. Mr. Putnam's commentary impugned the motives, conduct, integrity and patriotism of a named individual, Mrs. Dorothy Healey, because she was a member of the Communist Party. In so doing he raised one of the most serious issues our nation has had to face: whether society should heap disapprobation upon individu merely because they are associated with various unpopular organizations. Can a Communist Party member, such as Mrs. Healey, have the "redeem social qualities of patriotism, honesty, integrity and compassion for other human beings to which the Los Angeles Times referred? Or human beings. Mr. Putnam and KTTV-TV apparently feel such a member cannot. I believe, at least, that a right of reply is invoked.

A second issue of controversy and public importance raised by Mr. Putnam's broadcast is how the Government treats Communists,

such as Mrs. Healey. In his commentary Mr. Putnam hotly denied the charge by Mrs. Healey that "[i]n case after case, the parents of young people who have visited her are visited and threatened with the loss of their jobs if their children come back any more to see her." "Come, come, now Dorothy," he said, "perhaps under Communism--perhaps under the Nazis--but it just doesn't happen in the United States of America Equal contempt was shown against her allegations of phone [illegible] phone tapping and mail examination.

Again, I do not believe it is possible to argue that Government surveillance and treatment of minority and unpopular political parties in this country is not an issue of great controversy and public importance. One need only consult the daily newspaper to find repeated instances of such government misconduct. See, e.g., The Washington Post, July 9, 1970, p. A-1 (Internal Revenue Service surveillance of public library readers). We know that Congress has authorized law enforcement offic to wiretap private conversations; we know that wiretapping is regularly used by the government to maintain surveillance over certain persons vi as "nonconformist"; and we know there is extreme public controversy over privacy of communiscations--certainly an issue of great public importance. [illegible] Conspiracy Trial."

To argue, therefore, as does the majority, that Mr. Putnam's commentary did not raise issues of controversy and public importance is simply to define such issues out of existence. 6/ The issues involved

here are not merely "the role played by [Mrs. Healey]. . .as a Communist," as the majority contends. It is almost precisely the converse: the role played by Communists in general, as exemplified by the alleged activities of one person, and the treatment such persons receive as a group at the hands of our government.

The Commission also argues that a "second factor" is, in some obscure way, influential to its decision. Because Mr. Putnam supposedly "devoted considerable time" in his commentary to reciting Mrs. Healey's views, the majority feels that the need to grant Mrs. Healey the protectio of the Fairness Doctrine is lessened. Yet this argument does no more than bootstrap the majority out of one untenable position into another. Unwilling to establish this position as a separate and independent ground against Mrs. Healey, and unable seriously to contend that the broadcast did not raise controversial issues of public importance (the majority devo one-half of one sentence to this contention, merely stating its argument a its conclusion), the majority somehow attempts to alchemize two untenabl positions into a valid or even plausible one. Its uneasy amalgam fails. It s

Although the Los Angeles Times devoted hundreds of column inches to the Healey story--the longest story in the Times' entire Sunday edition--Mr. Putnam quoted no more than eight sentences from it, and de more than seven times that attention to his own view.

Of even greater significance, however, is the manner in which he presented his commentary--beginning with three paragraphs of inflammatory rhetoric ("if I were a young lad back from Vietnam, lying in one of our Veterans' hospitals--a leg gone--an arm missing--blind or faceless--from the horrors of that war. . ., I would be shocked into rage by the story that appeared. . . in the Los Angeles Times . . .;" etc.), and then quoting (out of context) only those portions of the story most adverse to Mrs. Healey.

The Commission should not negate the Fairness Doctrine whenever the speaker presents the opposing view as only a stalking horse for attack. Red Lion Broadcasting Co., Inc. v. FCC, 395 U. S. 367, 392 n. 18 (1969) The fairness doctrine is not met by any licensee who says, "John Smith claims he's not a crook, but let me tell you why he is"--and then proceeds to attack the honesty and integrity of Smith. As we said in our Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246, 1253 (1949), the licensee may not "'stack the cards' by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other . . . ." [illegible] If the majority is unwilling to let its "second" argument stand on its own, it cannot use it to buttress the position that no issue of controversy is involved. Indeed, precisely the opposite may occur: by merely stating the attacked position,

the licensee may at least indicate the existence of a controversy, or even create or intensify one.

There is little doubt that Mr. Putnam's commentary constituted a "personal attack" upon Mrs. Healey--that is, it attacked her "honesty, character, integrity" and "like personal qualities." See 47 C. F. R. 73.123 (Personal Attack Rules). There is equally little doubt that the attack was made during the discussion of several issues of public importance and controversy. The formal Personal Attack Rules contained in 47 C. F. R. 73.123, however, do not apply to Mr. Putnam's broadcast--principally because 47 C. F. R. 73.123(b) (3) exempts "commentary or analysis" contained in "bona fide newscasts." Although we have been given no direct evidence that the commentary in question was contained within a "bona fide newscast," all parties seem to concede this, and therefore I concur in the majority's position that our codified Personal Attack Rules do not protect Mrs. Healey.

However, a Note to 47 C. F. R. 73.123(b) (3) specifically provides that the fairness doctrine nevertheless applies to personal attacks otherwise exempted by Section 73.123(b) (3). We spelled this out quite clearly in our Memorandum Opinion and Order, 12 F. C. C. 2d 250 (1968), adding subsection (b) (3) to section 73.123(b). There we stated that the Fairness Doctrine nevertheless applied to situations exempted from the more technical requirements (notification, transcripts, etc.) of the Personal Attack Doctrine:

> As stated, the Fairness Doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints. . . . Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, . . . the [fairness] doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue--the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond. [Emphasis added.]

Memorandum Opinion and Order, 12 F. C. C. 2d 250, 252-53, par. 5 (1968).

According to this clearly enunciated doctrine, the licensee cannot reject Mrs. Healey's request for rebuttal time. Mr. Putnam has placed her "redeeming qualities" or "patriotism" in issue, and it is her statemen on the issue of visitor intimidation that Mr. Putnam disputes--indeed, claims that Mrs. Healey herself does not believe. The licensee has taken no steps to satisfy its fairness doctrine obligation in this regard. Therefore, Mrs. Healey is the only "clear and appropriate spokesman to presen the other side. . . ." The fairness doctrine can be satisfied in no other w

In sum, the Commission's Personal Attack Rules are merely one "aspect of the fairness doctrine. . . ." Red Lion Broadcasting Co., Inc. v. FCC, 395 U. S. 367, 373 (1969). Although the Personal Attack Rules were first codified in 1967, the doctrines they embody are of long standing. See Red Lion, supra at 375-79. Prior to the 1968 Personal Attack Rules amendments, see Memorandum Opinion and Order, 12 F. C. C. 2d 250 (1968), therefore, it is clear that Mrs. Healey would have been permitted time to reply to the attack made upon her. Yet those 1968 amendments suspended only the more technical aspects of the Personal Attack Rules--such as formal notification and proffer of scripts. See 47 C. F. R. 73. 123(a). They did not alter or in any way affect the obligation to offer an attacked person rebuttal time under the longe[illegible]eral established case law of the fairness doctrine. Given [illegible] Given Mrs. Healey's "personal involvement in the controversy," Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246, 1252 (1949), therefore, Mrs. Healey's response is the only method for satisfying the fairness doctrine. Memorandum Opinion and Order, 12 F. C. C. 2d 250, 252-53, par. 5 (1968); see Letter to Mr. Nicholas Zapple, FCC 70-598, p. (released June 3, 1970). Pursuant to our Memorandum Opinion and Order, 12 F. C. C. 2d 250, 252-53, par. 5 (1968), if the licensee does not itself fairly present the contrasting viewpoint (which KTTV-TV has not done here), it must afford the person attacked (Mrs. Healey) a reasonable opportunity to do so.

Several disturbing aspects of this case remain. One is the Commission's tardiness. Almost a year and a half have passed since Mr. Putnam's broadcast. Yet during that time Mrs. Healey has been unable to obtain even an appealable order from this Commission. Even if she should seek and obtain judicial reversal of the Commission's actio her victory would be pyrrhic indeed--the stale assurance of a few minute of airtime to rebut charges made at least two years earlier. As Supreme Court Justice Harlan has observed, procedural delays may become so severe that they violate substantive rights:

> It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. (A Quantity of Books v. Kansas, 378 U. S. 205, 215, 224 (1964) (dissenting opinion).)

> [T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. . . . [A]pplications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures. (Shuttlesworth v. City of Birmingham, 394 U. S. 147, 159, 163 (1969) (concurring opinion).

In areas vital to the full expression of First Amendment freedoms, such as the Commission's administration of the Fairness Doctrine, our proce must show "the necessary sensitivity to freedom of expression." See Freedman v. Maryland, 380 U. S. 51, 58 (1965). In this we have clearly failed. 7/

A second disturbing aspect of this case is the majority's failure to provide any justification for its view that no controversial issue of public importance was raised by Mr. Putnam's broadcast. I have carefully read the majority's opinion, and so far as I can determine, its total reasoning on this point is contained in the following sentences:

> With this as background, we turn to the facts of this case. First, we note the licensee's judgment that the matter which you [Mrs. Healey] claim to be a controversial issue of public importance--the role played by you as a Communist--is not an issue of public importance in its area.

This statement is noteworthy on two grounds. First, the majority completely defers to "the licensee's judgment." At no point does the majority indicate even that it has a view on the fundamental issue; it merely "notes" the licensee's judgment and passes on to other considera

I have elsewhere objected to this deference, and will not repeat my arguments here. See Letter to Mr. Donald A. Jelinek, FCC 70-597, pp 8-9 (June 4, 1970) (dissenting opinion). Second, Second, the majority has failed entirely to justify its conclusion; it merely states its result without argumentation. I do not believe the First Amendment ca tolerate such a cavalier use of arbitrary power, and suspect the majority' decision is reversible on this ground alone. The Supreme Court has written that "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression . . . ." Freedman v. Maryland, 380 U. S. 51, 58 (1965). The majority's failure

to grapple with, much less even enunciate, the issues involved here amply illustrate the truth of that statement.

A third disturbing aspect of this case is its implication that the Commission will not apply the Fairness Doctrine even-handedly, but will deny its benefits to those groups a majority of Commissioners find "subversive." In Storer Broadcasting Co., 11 F. C. C. 2d 678 (1968), Commissioner Robert E. Lee wrote in dissent that the Commission should not permit the DuBois Club to rebut allegations that it was a communist front organization, stating: "The Fairness Doctrine ends at the international border and I would not take the responsibility of turning the microphone over to those who would advocate the overthrow of the Government by other than the democratic process." Id. at 681. I believe the results in this case can only be rationalized by an acceptance of Commissioner Lee's position in Storer. See Storer Broadcasting Co., supra; Tri-State Broadcasting Co., Inc., 40 F. C. C. 508, 3 P & F Radio Reg. 2d 175 (1962). Therefore I cannot support such a position. If in fact the Commission majority has adopted Commissioner Lee's position, I am left with a profound uneasiness at this Commission's ability to administer the Fairness Doctrine. I believe citizens seeking to exercise their rights of speech over the broadcast spectrum are entitled to far better treatment by their government. I dissent.

Footnotes

1/ Storer Broadcasting Co. (DuBois Club), 11 F. C. C. 2d 678, 681 (1968) (Commissioner Robert E. Lee, dissenting).

2/ For a recent example, see Letter to Mr. Donald A. Jelinek, FCC 70-595 (released June 4, 1970).

3/ Tri-State Broadcasting Co., Inc., 40 F. C. C. 508, 3 P & F Radio Reg. 2d 175 (1962).

4/ Storer Broadcasting Co. (DuBois Club), 11 F. C. C. 2d 678 (1968).

5/ This attack is virtually identical to, if not substantially worse than, the one made on Fred J. Cook by the Reverend Billy James Hargis--which formed the basis for the Supreme Court's affirmation of the Commission's Fairness Doctrine. For pertinent textual portions of the Hargis attack, see Red Lion Broadcasting Co., Inc. v. FCC, 395 U. S. 367, 371 n. 2 (1969). I cannot distinguish the Hargis attack from the present one--except by observing that Cook was not a member of the communist party, whereas Mrs. Healey is. The principle that emerges is a disquieting one: the Fairness Doctrine permits non-communists to argue that they are not communists, see Storer Broadcasti Co. (DuBois Club), 11 F. C. C. 2d 678 (1968), and cf. Red Lion, supra, but it does not permit communists to argue that they are not undesirable or dangerous people, see Tri-State Broadcasting Co., Inc., 40 F. C. C. 503, 3 P & F Radio Reg. 2d 175 (1962), and the instant case. Yet presumably the justification for permitting the argument that one is not a communist is precisely that communists (as a group) are undesirabl or dangerous people. [illegible] a significant difference between [illegible] that one is [illegible]--but [illegible] is [illegible]

6/ A procedure at which the Commission is becoming increasingly expert. See Letter to Mr. Donald A. Helinek, FCC 70-595 (released June 4, 1970) (dissenting opinion).

7/ In Robinson v. Coopwood, 292 F. Supp. 926 (N.D. Miss. 1968), aff'd per curiam, No. 27,275 (5th Cir., Oct. 22, 1969), for example, a federal court struck down as unconstitutional a municipal ordinance requi civil rights demonstrators to give the police one hour's notice before marching on the community's public streets. The Court thought that even a one hour's delay exerted a "stifling effect" on the exercise of First Amendment speech, id. at 930, and that the ordinance acted "as an unconstitutional prior restraint" on such speech. Id. at 932. If a delay of one hour is unconstitutional under certain circumstances, what then of a year and a half's delay? The Commission's unconscionable delays

in Fairness Doctrine matters such as this, together with its apparently discriminatory treatment of petitioners depending on their political views, raises serious question whether petitioners ought to be given the right to circumvent the Commission in Fairness Doctrine matters and proceed directly to federal court for relief, with the licensee and FCC carrying the burden of showing that petitioners ought to be denied access to the licensee's facilities. See Freedman v. Maryland, 380 U.S. 51 (1965).

(Commissioner Johnson's Appendix, the contents of which is set forth in identical form in the enclosure to petitioner's letter of complaint, see pp. 3-5, supra, is omitted here.)

C7-1482

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July 24, 1970

Mr. William B. Ray, Chief
Complaints and Compliance Division
Federal Communications Commission
Washington, D. C. 20054

Re: Dorothy Healey v. KTTV (8330-M; C4-85)

Dear Mr. Ray:

Under date of March 26, 1969, I filed on behalf of Mrs. Healey a request for review of KTTV's refusal to allow Mrs. Healey to reply to an editorial broadcast over that station on February 17, 1969, by George Putnam.

A few days ago I read in the newspaper that the request has been denied. To date I have received no notice with respect thereto. Will you please advise me as to the action that has been taken and send me a copy of whatever decision, if any, has been rendered in said matter.

Very truly yours,

BEN MARGOLIS

BM:rlp

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